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July 12, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W. - Room TWB-204
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: *Ex parte*, CC Docket No. 98-147, Development of Wireline Services Offerings Advanced Telecommunications Capability

Dear Ms. Salas:

Attached is a copy of the testimony of Mark Rosenblum, Vice President - Law and Chief Litigation and Federal Regulatory Counsel, AT&T, before the House Judiciary Committee on June 30, 1999. Please include a copy of this Notice in the record of the above-captioned proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

ATTACHMENT

cc: C. Mattey
S. Pies
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Written Statement of Mark C. Rosenblum
Vice President – Law and Chief Litigation and Federal Regulatory Counsel, AT&T
House Judiciary Committee
June 30, 1999

It is a pleasure to appear before this Committee today to discuss H.R. 1685 and H.R. 1686. We commend the Committee for the leadership role it has played in the last three years in ensuring appropriate enforcement of the antitrust laws in the telecommunications industry.

Before passage of the Telecommunications Act of 1996 (the "Telecom Act"), investment in the cable and telecom industries was sluggish. Now, with the legal and regulatory certainty the Act provides, investors are flocking not only to cable providers and incumbent monopolies, but also to competitive local exchange carriers, wireless providers, and other telecom companies.

We at AT&T believe that government policies that encourage entry and investment by, and promote competition among, providers of broadband services promise enormous benefits to all Americans. AT&T has embarked on a mission of investing in the widest possible deployment of broadband technology and services to consumers. For us, broadband technology is not merely an effort to promote high-speed Internet access, important though that is. Rather, we've always been a communications company, and our plan is to use our broadband capabilities to compete in *local* phone markets across the country, offering spirited competition to the incumbent monopoly local exchange carriers – all resulting in lower prices, better service, and more choices for millions of residential consumers. Our actions in the marketplace are fulfilling the promise of the Telecom Act.

We will use cable technology to provide local phone service. We approach the issue of the proposed Goodlatte-Boucher legislation from this perspective.

If we have learned anything in the few short years that the Internet has become such an important part of the fabric of our national life, it is this: we cannot legislate technology. To do so would distort not only the workings of markets, but the development of technology itself. Further, it would stifle investment – the very investment that permits entrepreneurs to develop and market powerful and innovative new technologies. Competition among *technologies*, as well as among companies, will lead to the quickest possible deployment of broadband services. We certainly hope that high-speed access to the Internet through cable succeeds in the marketplace, but we know that will occur only through competition among cable, satellite, and DSL providers.

Yet the proposed legislation would violate the most basic antitrust principles by requiring Federal courts to ignore the reality of intense rivalry among alternative broadband technologies. It would thus *discourage*, rather than encourage, investment and competition and harm rather than help consumers. Of course, *any* attempt to replace the antitrust laws' traditional focus on case-by-case consideration of the relevant markets and the competitive forces in those markets with inflexible legislative determinations should be approached with great caution. But this is especially true in markets characterized by rapidly evolving technologies. There is simply no reason even to try to do so here. Market forces, buttressed by existing antitrust laws and specially-tailored regulatory protections – in particular, the Telecom Act provisions designed to prevent the incumbent local telephone companies from extending or abusing their monopolies – are a superior approach.

Since enactment of the Telecom Act, AT&T has led the telecommunications and cable industries in investing billions of dollars to upgrade cable facilities to provide Internet and local telephone services – a risky proposition given that the dominant local telephone monopolies and Internet providers have virtually all of the customers today. But we and others are making those investments on the understanding that the national policy embodied in the Telecom Act requires that we do our part to foster the local phone competition that is the central promise of the Act.

Preserving competitors' incentives to make these investments is not simply important in its own right. The mere announcement of our cable upgrades – and particularly AT&T's unrivalled public commitment to short-term and large-scale deployment – have, in turn, spurred the local telephone monopolies and others to finally deploy the broadband technologies they have had sitting on the shelves for years and, equally important, to enter into commercial arrangements with Internet providers (notably AOL) to bring even broader choice to consumers.

The proposed legislation, in contrast, would deny the cable companies that have largely stimulated these vibrant market forces the right to respond to market forces in balancing customer demands, technology constraints, and legitimate network congestion concerns and in pursuing commercially-negotiated arrangements of their own. Ironically, this could only discourage both cable investments *and* the long-overdue competitive response to those investments by today's dominant providers of Internet and local telephone services.

That would be a very high price to pay, particularly given the reality of the marketplace. Competition will ensure that consumer demands for the services they want

are met. Any cable provider that fails to offer customers the services and choices they demand will simply lose in the marketplace. AT&T recognizes this reality, and having committed more than $100 billion of its shareholders' resources to acquire TCI and MediaOne and upgrade their cable facilities, is fully committed to making sure that consumers are able to access the content of their choice – a point our Chairman, C. Michael Armstrong, has made publicly on numerous occasions. If we don't give consumers what they want, they will simply go somewhere else – or, more precisely, given that we are just getting started here, *stay* somewhere else, which is with the incumbent local phone companies.

Thus, the question here is not whether cable systems will be "open," but whether new facilities and services that offer the most viable near-term hope for legitimate local competition should be allowed to develop in accordance with customer demands and market forces – rather than through protracted and costly litigation that will discourage the very investment necessary to generate this rivalry and the ensuing consumer benefits.

The remainder of this testimony is organized in two parts. First, it discusses why we believe existing laws are more than adequate to address potential anticompetitive conduct in the broadband area and that the proposed legislation is fundamentally flawed. No new legislation is necessary to protect consumers of broadband services. Moreover, the proposed legislation is fundamentally flawed from the perspective of antitrust jurisprudence and economics. Second, we believe the proposed legislation would in fact retard the rapid deployment of broadband technologies both by placing unwarranted new regulatory constraints on cable companies and by removing existing protections against anticompetitive conduct by local telephone monopolies. By contrast, the best way to

make sure that *all* consumers have access to a variety of broadband technologies and services, including both cable-based systems and systems provided by the local telephone monopolies, is to allow market forces, constrained by existing regulatory protections, to continue working.

The Existing Antitrust Laws Are Working

Regardless of one's perspective on the appropriate role of government in the deployment of broadband, there would still remain many reasons to oppose attempting to change the Federal *antitrust* laws in the manner proposed in this legislation. From the perspective of antitrust law and antitrust economics, there are a number of serious shortcomings in this proposed legislation.

First, this bill imposes an inflexible statutory definition of the relevant "market" (the "broadband service provider market") which is inaccurate at best and more generally inappropriate. In the normal course, under well-developed case law, an antitrust plaintiff must prove that the defendant has the power to control prices and output and exclude competitors in a relevant market. The appropriate definition of the relevant market is thus the starting point of traditional antitrust analysis. To determine what the relevant market actually is, agencies and courts must consider the facts as to whether customers have alternatives that effectively prevent a firm from raising prices or limiting choice without losing business – in antitrust jargon, the "elasticities."

This bill, in contrast, would foreclose the usual role that economic realities and evidence play in this determination and force an artificial definition of the market. Not only does the bill decree that broadband services are the relevant market – even though

broadband Internet access services plainly compete with narrowband services today – the bill further declares that the facilities of a *single* broadband access provider constitute the relevant market. In essence, this bill would bypass relevant case law and deem individual broadband networks to be "essential facilities" (*i.e.*, those that are essential for competition in the relevant market) *without finding any ability to exercise monopoly power and notwithstanding that those seeking access to such a network have alternative suppliers that can provide the same or similar high-speed capabilities.* This ignores long-developed precedent on the essential facilities doctrine by asserting a presumption of a Sherman Act violation based only on a broadband access provider's legitimate business decision.

Problems with this statutorily-mandated definition will grow even worse as technology evolves in the coming years and even more alternatives for communications and broadband technology appear in the market. Rather than forcing Congress to perpetually revisit this question of the appropriate market definition, therefore, the easier and more logical course is surely to preserve traditional antitrust principles and analysis by letting administrative agencies and courts determine the relevant market in any enforcement or damages action.

Second, the bill's proposed new procedural rules in antitrust suits involving broadband Internet access threaten to sow considerable confusion and lead to a litigation and regulation explosion. For example, Section 102 of the bill establishes a presumption of a Sherman Act violation any time a cable company that provides broadband Internet access seeks to negotiate terms and conditions for access with one ISP that are in any way different from those offered to any other ISP. But the legislation is silent as to how this

would work in practice. What does it mean to say this is a presumption? What evidence would suffice to rebut it? What happens in Sherman Act cases after the applicability of the presumption has been established? More fundamentally, the procedure envisioned in the legislation would inevitably enmesh the Federal courts in all 50 States in setting, overseeing and administering the rates, terms, and conditions for interconnection between literally thousands of broadband and Internet providers. This is certain to be extraordinarily costly and cumbersome. It would also foreclose the very innovation that the antitrust laws otherwise seek to foster by preventing new firms with new ideas from investing in new approaches that may require different interconnection arrangements.

Stated broadly, we are seriously concerned that the proposed legislation would lead to sharply increased litigation, rather than healthy industry competition. The bill creates the "presumption" of a Sherman Act violation any time a broadband service provider merely offers more favorable terms or conditions to one ISP. This presumption would apply without regard to whether this access was the result of fair commercial bargaining between the parties or the need of broadband service providers to recoup their investments. In effect, the bill would establish a new cause of action for the more than six thousand ISPs every time a broadband provider enters into an agreement with an ISP.

Because the bill gives special advantages to plaintiffs, defendants would have the scales tipped against them. As noted above, the legislation is unclear regarding whether the presumption of a Sherman Act violation is rebuttable and how defendants may challenge the presumption in court. It follows naturally that accepted procedural devices for quick dismissal of meritless litigation, such as motions to dismiss or motions for summary judgment, would be difficult, if not impossible, for defendants to obtain. This

would considerably increase the costs of litigation for *all* parties, as even meritless claims could proceed only to trial or settlement.

Finally, this bill marks a sharp departure from the philosophy that has animated antitrust jurisprudence for over a century. The Sherman Act was intentionally written in language that is somewhat simple and general to ensure that courts have adequate flexibility to respond to rapidly changing market conditions and to new economic developments regarding the nature of the competitive process in particular markets.[1] Moreover, courts have uniformly recognized that the Sherman Act is a law of general application and is for the "protection of competition, not competitors."[2] Historically, the Federal antitrust statutes have been laws of general application. Accordingly, courts have generally rejected special, narrow presumptions or exceptions. Similarly, Congress has appropriately rejected prior legislative proposals suggesting specific presumptions or exceptions covering the health care, transportation, and energy industries, even in the face of asserted public health and safety rationales.

In sharp contrast, this bill is written in industry-specific and frankly protectionist terms that are contrary to the pro-competitive spirit of long-standing Federal antitrust laws. Likewise, rather than giving competitors and courts the ability to respond to new market conditions and to economic developments, it artificially dictates the relevant market and decrees that each broadband provider's system is an essential facility. Not

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[1] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, at the lowest prices, of the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were the premise open to question the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 4 (1958).

[2] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

only is this approach unprecedented, but the legislation would prevent broadband access providers from demonstrating in court that actual competition exists between or among different broadband companies and technologies. In short, this bill would protect competitors at the expense of competition.

Surely Congress cannot desire this result: to adopt this legislation would retard the competition among technologies that lies at the heart of innovation. Any new technology, by virtue of its newness, its challenge to the established way of doing things, would be seen as a potential monopoly – a strong deterrent to innovation.

Towards the Broadband Future

Of equal importance to the consideration of the proposed legislation is the question of whether this bill would further or retard an important public policy goal: achieving the rapid deployment of all types of competing broadband technologies to consumers. AT&T has a strong interest, shared by many on this Committee, in ensuring that broadband technology is deployed quickly and widely to all types of consumers. Regrettably, this bill, while intended to spur the deployment of advanced telecommunications services, would actually undermine the pro-competitive policies of the Telecom Act in several important ways.

First, as explained above, competition, not regulation, provides the best incentive for broadband deployment. In fact, had this legislation already been enacted, we would not be witnessing the current dramatic explosion in competition to provide consumers with high-speed Internet access. Since cable companies have entered the broadband market, deployment of all types of advanced broadband services has skyrocketed. While

DSL broadband technology has been around for years, the RBOCs and GTE began stepping up their deployment and lowering their prices *only* in response to the emerging competition from CLECs, cable companies, wireless, and satellite providers.

The FCC has noted that investment in broadband facilities by cable operators and CLECs "spurred incumbent LECs to construct competing facilities."[3] Wall Street analysts have likewise observed that competition from cable and CLECs is the primary force spurring incumbent LECs to increase their investment.[4] This appears to be the case in markets around the country, where the ILECs have lowered their prices and expanded their coverage areas in response to the entry of competitors.[5]

Indeed, four RBOCs (SBC, BellSouth, U S WEST and Bell Atlantic) and GTE expect to be able to offer DSL service to over *31 million* homes in their regions by the end of *this year*. Competition keeps driving deployment ever faster and prices ever lower. For instance, in January 1999, SBC accelerated its deployment timetable by two years and reduced its price for 384 kbps DSL service about 30% to $39 per month. Likewise, in May 1999, U S WEST dropped its price for 256 kbps DSL service 25%, to only $29.95 per month, making it a much more attractive offering.

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[3] *706 NOI Report* ¶ 42 & n.84.

[4] *E.g.*, J.P. Morgan Report titled "DSL: the Bells Get Serious: 1999 Promises to be the Year of DSL Deployment, March 19, 1999: "We detect a dramatic change in the attitude of the local phone companies toward DSL deployment...[T]here are several forces driving the local phone companies to accelerate their DSL deployment. Most notable is the rollout of cable modems by cable companies..."

[5] *See, e.g.*, Mike Farrell, *PacBell to Lower DSL Rates in Calif.*, Multichannel News, November 23, 1998. In other markets where cable operators have initiated broadband service, the incumbent carriers quickly followed suit. For example, @Home launched service in San Francisco in September 1996 and San Diego in May 1997, and Pacific Bell followed in November 1997 and September 1998, respectively. *See Pacific Bell's ADSL-Internet Access Packages Now Available to 180 California Communities* (visited March 18, 1999) <http://www.sbc.com/PB/News>. Likewise, after @Home launched service in Phoenix in May 1997 and Denver in June 1998, US WEST followed in October 1997 and June 1998, respectively. *See US WEST Launches Ultra-Fast DSL Internet Service in Twin Cities; Continues Roll Out* (visited March 18, 1999) <http://www.uswest.com/com/insideusw/news/051398b.html>.

Particularly since AT&T announced its intent to use cable systems to provide high speed Internet access, deployment of all types of advanced broadband services has skyrocketed. Having amassed a dominant share of Internet subscribers while ignoring demand for broadband Internet access for years, AOL has now announced a series of initiatives with the RBOCs to provide high speed access over telephone lines. Likewise, AOL has just announced a venture with Hughes to deliver broadband service via satellites.

Second, the proposed legislation would directly undermine the pro-competitive policies of the Telecom Act that have accelerated investment in new state-of-the-art local networks. As a direct consequence of the landmark Telecom Act, over 150 competitive local exchange carriers (CLECs) are in business today, providing new jobs and investing billions of dollars in the Nation's telecommunications infrastructure.

This progress, however, has not come quickly or easily and has still not brought meaningful local competition to the overwhelming majority of Americans. Rather than complying with the Act's market-opening requirements, the incumbent local exchange carriers (ILECs) have opted to delay the onset of local competition by challenging the constitutionality of the Act and appealing almost every state and FCC decision adverse to their interests, or by simply refusing to do what the Act plainly requires. The ILECs continue to control 97% of their local markets, and the very popularity of second lines devoted to data services has only served to reinforce this level of market dominance. Thus, new entrants and competitive companies continue to face an uphill battle as they work and invest to make local competition a reality.

After almost three full years of litigation, having now failed in that effort, the RBOCs and GTE are now asking Congress to reward their recalcitrance by making exceptions in the Act for the provision of data services, including across LATA (local access and transport area) boundaries. They claim that this legislative "relief" is needed to foster broadband deployment.

Yet this claim is based on several false premises.

First, the Act is *technologically neutral*; its pro-competitive policies apply equally to both voice and data. Recognizing that Americans deserve a competitive choice both when they use the phone and log on to a computer, Congress made no distinction between voice and data traffic in the Act. The Act, like the 1984 antitrust decree before it, encompasses *all* telecom services, and already provides the relief the ILECs seek – when they open their local monopolies to competition.

Second, granting "limited" relief covering data is functionally equivalent to granting total, unconditional relief from the requirements of Sections 251 and 271 to the ILECs. Over half of today's telecommunications traffic is data, and data traffic is growing at 30% per year, according to the Dataquest research firm.[6] Another estimate has data "outgrowing voice 15:1," noting that "90% of data is long-haul rather than local."[7]

In addition – as the ILECs well know – with the advent of Internet Protocol (IP) technology, the distinction between "voice" and "data" traffic, already blurred, is quickly disappearing. Indeed, voice and data are transported over the same network, not two distinct networks. As an SBC executive recently stated, "DSL is a bigger deal than high-

[6] Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

speed access to the Internet; it's about renewing our networks."[8] This view is supported by industry analysis: one report affirms that "[t]he telecommunications industry is making a fundamental shift from circuit switched voice networks with data overlays to packet switched data networks with voice overlays."[9] Thus, although the proposed legislation would exclude voice-only services from this LATA relief, the reality is that under today's technology, there may be no such thing as a voice-only service.

Far from fostering broadband deployment in rural and other underserved areas, this legislation would actually hinder it. The ILECs have argued that legislative action is necessary for the deployment of broadband in rural areas. In actuality, however, large incumbent monopoly carriers have been abandoning their rural customers and selling off rural lines. U S WEST and GTE, in particular, have been active in selling off small rural exchanges to concentrate on urban and suburban markets; U S WEST alone has sold over 400 rural exchanges since 1994, while GTE is currently shedding 1.6 million lines, including all of its wireline exchanges in Alaska, Arkansas, Arizona, Iowa, Minnesota, Nebraska, New Mexico, and Oklahoma. Notably, one securities analyst observed that "[w]e believe the large ILECs would be inclined to divest more rural properties if they judged that they could do so without political fallout."[10] All this raises serious questions about the commitment of the RBOCs and GTE to serving rural customers, with or without the relief they seek in this legislation.

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[7] Jack Grubman, "Review of Our Position on RBOCs: SBC & BEL will create most value," Salomon Smith Barney, March 9, 1999.

[8] Andrew Brooks, "SBC Accelerates Plans for High-Speed Net Lines," *The Dallas Morning News*, June 16, 1999, at 4D.

[9] Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

[10] Michael J. Balhoff, CFA, and Tina T. Heidrick; "Harvesting New Value: The Rural Local Exchange Industry," Legg Mason Equity Research, Spring 1999, at 16.

Moreover, the scope of this legislation is not limited to rural areas. For example, provisions in the legislation would bar competitors from leasing DSL-equipped lines from the incumbents, limiting their ability to compete at all in rural or other areas.

Conclusion

In short, the market, properly constrained by *existing* antitrust and regulatory protections, is working. Incumbent carriers are already responding to the pressure of even modest market entry by new competitors, and the benefits of this rivalry can only accelerate as new entry becomes more significant. In these circumstances, the proposed bill can only do harm. Government should not tamper with this evidence of a market that is working. Experience has shown that the best way to encourage broadband deployment is to encourage and ensure competition for local monopolies and Internet giants. In short, the Act is beginning to working just as Congress intended; now is not the time to reopen the Act.

We respectfully urge this Committee to promote quick and wide deployment of broadband technologies in the best way possible: by standing with the Act and existing antitrust laws and opposing efforts such as this legislation to rewrite them in furtherance of narrow interests that are in direct conflict with the public good.